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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 597

HAROLD P. BALLF,

Petitioner,

vs.

THE PUBLIC WELFARE DEPARTMENT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, and RONALD H. BORN, director thereof, and THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, and individual members thereof, FRANCIS P. WALSH, WILLIAM A. LAHANIER, and CHARLES T. McDONOUGH, and THE RETIREMENT BOARD OF THE CITY AND COUNTY OF SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM, and IRA G. THOMPSON, secretary thereof,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal, State of California, First Appellate District, Division One, and/or the Supreme Court of the State of California.

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Attorney at Law in Pro Per.

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to the District Court of Appeal, State of California, First Appellate District, Division One, and/or the Supreme Court of the State of California.

Petitioner prays that a writ of certiorari issue to the District Court of Appeal, State of California,

First Appellate District, Division One, and/or the Supreme Court of the State of California, to review the judgment of the Superior Court of the State of California in and for the City and County of San Francisco, dated January 12, 1956, and affirmed on appeal by the District Court of Appeal, State of California, First Appellate District, Division One, on June 19, 1957, hearing on which was denied by the Supreme Court of the State of California on August 13, 1957.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court of Appeal State of California, First Appellate District, Division One, is reported and is printed in Appendix B attached, *infra,* page vii. It is cited as *Harold P. Ballf, Appellant v. The Public Welfare Department of the City and County of San Francisco, etc., et al., Respondents.* It is in 151 Advanced California Appellate 875.

The memorandum denying a rehearing in the District Court of Appeal, titled *Ballf v. Public Welfare Department of the City and County of San Francisco* (151 A.C.A. 875), may be found under "Minutes" 152 A.C.A. 522. It is printed in Appendix B, attached, *infra,* page xv.

The memorandum of the Supreme Court of the State of California denying a hearing in (1st Civ. 17310, Div. 1.) *Ballf v. The Public Welfare Dept. of the City and County of San Francisco, etc., et al.* (151

A.C.A. 875.), may be found in 49 Advanced California No. 1, under "Minutes" page 1. It is printed in Appendix B, attached, *infra,* page xvi.

Note: Rule 28, of Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, make the District Court of Appeal the repository for the record in this case. This rule is printed in Appendix A, attached, *infra,* page vi.

JURISDICTION.

The judgment of the Superior Court of the City and County of San Francisco was entered on January 12, 1956. It contained two parts numbered (1) and (2). R 70 and Appendix B attached, *infra,* page xvi. The first part denying the petition was appealed to the District Court of Appeal. The second part restoring petitioner to his retirement privileges was not appealed.

The opinion of the District Court of Appeal, filed June 19, 1957, is reported and is printed in Appendix B attached, *infra,* page vii. Rehearing was denied by that Court July 19, 1957, Minutes, Appendix B attached, *infra,* page xv.

Petition for a hearing in the Supreme Court of the State of California was denied on August 13, 1957. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

The federal law around which this case revolves (Public Law No. 346, 58 Stat. 284, 78th Congress

Servicemen's Readjustment Act of 1944), printed in pertinent part, Appendix A attached, *infra,* page i, was raised in the original pleadings, Allegations VI to VIII, Incl., R 4-5. It was argued orally before both the Superior Court and the District Court of Appeal. That the latter Court was familiar with this law is indicated by the footnote in the opinion, Appendix B attached, *infra,* page xiii.

This petition for a writ of certiorari also relies upon the provisions of Article V, Article IX, and Article XIV Section 1, of the Constitution of the United States, Appendix A attached, *infra,* page ii.

This petition asks that the writ of certiorari be directed in the alternative to the District Court of Appeal, State of California, First Appellate District, Division One, as it rendered the opinion and is apparently the repository for the record, Appendix A attached, *infra,* page vi, and/or to the Supreme Court of the State of California, because it is the highest state Court in which a decision could have been made.

QUESTIONS PRESENTED.

Whether a state Court through erroneous interpretation of the intent and purpose of a federal law in conjunction with city and county charter provisions may deprive petitioner of his property rights in a legally established status without due process of law as prohibited by Article V of the Constitution of the United States.

Whether a state Court by deliberately substituting an assumption contrary to fact for a fact and arriving at a decision adverse to petitioner may thus deprive petitioner of his property without due process of law and deny to him the equal protection of the law in violation of Article XIV, Section 1, of the Constitution of the United States.

Whether a state Court, by circumvention of a federal statute (Public Law No. 346) thereby denying the right of petitioner to the enjoyment of an employment status, may thus violate Article IX of the Constitution of the United States.

STATUTES INVOLVED.

Public Law No. 346, 58 Stat. 284, Appendix A, attached, *infra,* page i; City and County of San Francisco Charter provisions No. 7, Appendix A, attached, *infra,* page iii; No. 153 page iv; and No. 154 page iv.

Rule 31.3 of the Civil Service Commission of the City and County of San Francisco, Appendix A attached, *infra,* page v.

STATEMENT.

Harold P. Ballf, petitioner in the California Courts for restoration of his status as an employee, was a permanent civil service appointee of the City and County of San Francisco, duly and regularly assigned to the position of B-512 General Clerk-Typist in the

Public Welfare Department thereof. He held this position for several years prior to World War II.

On August 3, 1940 petitioner was called into the active service of the United States Army and was granted military leave without pay from his permanent position. He was honorably separated from the service on May 2, 1949, and the military leave previously granted to him terminated July 31st of the same year. A further leave of absence was then granted to him by the Civil Service Commission under what it termed educational leave for the period from August 1, 1949 through July 31, 1953.

The purpose of the educational leave of absence was to enable him to take advantage of benefits to which he was entitled "under any vocational or other training or educational program pursuant to the laws of the United States or the State of California". (Civil Service Rule 31.3, Appendix A attached, *infra* page v). The specific federal law under which these benefits accrued is known as Public Law No. 346.

Petitioner entered the Graduate Division, Department of Education of the University of California at Berkeley, California, and during all of the period of his educational leave pursued a full-time course of instruction as prescribed by the Veterans Administration of the United States and of the State of California. He obtained a general secondary teaching credential and a Master of Arts degree in education.

On July 9, 1953 petitioner applied for an extension of his educational leave under the provisions of Civil

Service Rule 31.3, for a period of thirty-six months from August 1, 1953. The request was made approximately twenty-two days before the expiration of the then current period of leave. It was made because petitioner had remaining entitlement under both the federal and state laws, and because he had not completed his course of study and was then working toward a Ph.D. degree in education.

At the time of his application for extension of leave petitioner was informed by a Mr. Brady of the Civil Service Commission that there would be no difficulty in obtaining it, and he was assured by a Mr. R. Brooks Larter, business manager, Department of Public Welfare, that in case any difficulty was encountered in obtaining the leave he, Mr. Larter, would so inform petitioner. (R. 30-32.)

Despite the assurances and promises above which petitioner accepted in good faith and relied upon, Mr. R. Brooks Larter, acting upon his non-judicial interpretation of that portion of Section 7 of the Charter of the City and County of San Francisco pertaining to residence of incumbent employees, brought about a recommendation for petitioner's removal from the service because as Charter Section 7 puts it he did not maintain "an abode therein (in San Francisco), where such resident with his family, if any, customarily spends the night," but on the contrary lived in the vicinity of the University of California where he could more conveniently pursue his courses of study. The recommendation was approved by the Civil Service Commission, and that body suggested to the depart-

ment that petitioner should be asked to resign from the service and in the event he refused to do so they authorized commencement of dismissal proceedings by the department. (Exhibit No. 5.)

A letter was addressed to petitioner on July 30, 1953 demanding that he resign on or before August 10, 1953, and stating that on failure to do so dismissal proceedings would be initiated against him for removal from the service of the City and County of San Francisco. This letter was written before the expiration of petitioner's educational leave. Meantime the application for an extension of petitioner's educational leave was still pending before the Civil Service Commission and no action was taken thereon. (Exhibit No. 5.)

On October 16, 1953, the Department of Public Welfare held a hearing on charges against the petitioner that he had lost residence in San Francisco, that he had been absent without leave, and that he had violated the terms of his educational leave. On October 28, 1953, Mr. Ronald H. Born, director, Public Welfare Department of the City and County of San Francisco, addressed a letter to petitioner informing him that he had been dismissed from his position of B-512 General-Clerk-Typist of the Public Welfare Department of the City and County of San Francisco, effective with the close of business October 16, 1953 for reasons specified, which were the same as the charges at the hearing. (Exhibit No. 7.)

None of the reasons detailed in the director's letter were grounds for dismissal under the provisions of

any section of the Charter of the City and County of San Francisco, and petitioner accordingly appealed the dismissal to the Civil Service Commission. On December 21, 1953, the commission informed petitioner by letter of that date that it had sustained the order of the Director of Public Welfare. (Exhibit No. 8.) No action whatever was taken then, or has ever been taken, either to approve or disapprove the request for extension of educational leave as required by the Civil Service Commission's own Rule No. 31.3. (Opinion, Appendix B attached, *infra,* page v.)

Petitioner, in July of 1954, petitioned in the Superior Court of the State of California, in and for the City and County of San Francisco, for a writ of certiorari, and an administrative writ of mandamus to respondents named, directing them to restore him to his former status of B-512 General-Clerk-Typist of the Public Welfare Department of the City and County of San Francisco, with all of the rights and privileges appurtenant thereto. The Court denied the writ but ordered that petitioner was entitled to exercise his option to remain in the Retirement System under the provisions of Section 165.2 of the Charter.

Petitioner appealed to the District Court of Appeal, State of California, First Appellate District, Division One, contending that the Superior Court erred in not granting the full relief sought. Briefs were filed on both sides, and after a hearing of arguments the judgment of the Superior Court was affirmed. The District Court of Appeal refused to consider the merits of the case, as stated by itself in the last para-

graph of the opinion of the Court, having gone entirely astray on the irrevelantly injected issue of residence.

After petition for rehearing in the District Court of Appeal was denied appellant petitioned for a hearing in the Supreme Court of the State of California. The later petition was denied on August 13, 1957.

Petitioner asks no more of the state Courts than that they clear his name and reputation of the stigma of the "discharge for cause" placed against him by the illegal and unwarranted action of the Public Welfare Department. He does not seek a money judgment other than his costs and disbursements in the Courts. He does not ask the ouster of any person from a position as that would be neither necessary nor possible since the last position held by petitioner has long since been permanently filled. He simply seeks restoration to a status of "leave without pay" from the classification of B-512 General-Clerk-Typist in the Public Welfare Department, said leave to be governed as to extent and termination by the provisions of Rule 31.3 (Appendix A attached, *infra*, page v) of the Civil Service Commission of the City and County of San Francisco.

REASONS FOR GRANTING THE WRIT.

Petitioner respectfully urges these reasons, which will be discussed below, for the granting of this writ of certiorari:

First: This case involves the operation of a federal law.

Second: The interpretation of the intent and purpose of this federal law in conjunction with City and County of San Francisco Charter provisions by the state Court has resulted in depriving petitioner of his property without due process of law and is in violation of Article V of the Constitution of the United States.

Third: The state Court deliberately substituted an assumption contrary to actual fact for a fact and has thus deprived petitioner of his property without due process of law, and denied to him the equal protection of the law, in violation of Article XIV, Section 1, of the Constitution of the United States.

Fourth: The decision of the state Court below circumvents Public Law 346, and other laws of like character, in such a manner as to deny or disparage rights in violation of Article IX of the Constitution of the United States.

DISCUSSION OF REASONS FOR GRANTING THE WRIT.

FIRST. THE CASE INVOLVES THE OPERATION OF A FEDERAL LAW.

The case arose out of the operation of federal Public Law No. 346. This law made provisions for educational benefits to the veterans of World War II, and was made the basis for City and County of San Francisco Civil Service Rule No. 31.3, which substantially incorporated its provisions on educational benefits. The latter rule was in turn authorized by Section 153 of the Charter of the City and County of

San Francisco. The erroneous interpretation given to the intent and purpose of these enactments has resulted in a grave injustice to petitioner and will continue, if not corrected, to form the criteria for and result in grave injustice to many others in positions similar to that of petitioner.

SECOND. THE INTERPRETATION OF THE INTENT AND PURPOSE OF THIS FEDERAL LAW IN CONJUNCTION WITH CITY AND COUNTY OF SAN FRANCISCO CHARTER PROVISIONS BY THE STATE COURT HAS RESULTED IN DEPRIVING PETITIONER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND IS IN VIOLATION OF ARTICLE V OF THE CONSTITUTION OF THE UNITED STATES.

The eligibility of petitioner to the rights and privileges of Public Law No. 346 is not in question. However when petitioner requested extension of his educational leave to take advantage of its remaining benefits the business manager of the Public Welfare Department brought about a recommendation for petitioner's dismissal from the service on the basis of his non-judicial interpretation of Section 7 of the City Charter, that is to say his opinion that petitioner had violated its residence requirement.

If it had any validity at all this belated recommendation for removal of petitioner from the service should have been made some fourteen (14) years before when petitioner entered the armed services of the United States and ceased to maintain "an abode therein (in San Francisco), where such resident with his family, if any, customarily spends the night."

Petitioner was not only "spending the night" outside of San Francisco, but outside of California for the most part, and outside the United States in Australia and New Guinia during many of the years of his active military service. He had not as yet resumed an abode in San Francisco because educational leave had been granted to him and he desired to live in the vicinity of the institution in which he was pursuing his courses of study.

Section 7 of the Charter was misconstrued not only by the director of the Public Welfare Department, but also by the civil service commission and the state Courts in all of their deliberations for the reason that the section does not impose a residence requirement on persons on leave of absence. The section requires an abode in San Francisco, of its personnel who are actually on the job, rather than a residence, by its express and unequivocal terms. It in no way limits or circumscribes the operation of Public Law No. 346.

There is not a word in Charter Section 7 which requires an abode in San Francisco of a person on leave without pay. Such an interpretation must be tortuously read into it by first asserting that personnel on leave without pay are in exactly the same status as personnel working on the job. Then after placing the person on leave without pay in the position of personnel actually performing the duties of the position and enjoying the emoluments thereof the interpretation can proceed to assert that such person must maintain "an abode therein (in San Francisco),

where such resident with his family, if any, customarily spends the night," or else he is violating the residence requirements of Charter Section 7.

The absurdity of such an interpretation is at once manifest when it is admitted, as it was in the decision, that none of the statutes in question placed any restriction upon the institution or locality in which the veteran could pursue his course of study. The enactments certainly did not contemplate that petitioner maintain an unoccupied abode in the city in which he held employment status during the many years that he might be absent on leave either in the military service or for educational purposes. The obvious intention of the framers of this section which unequivocally defines residence for its intent and purpose as "an abode therein (in San Francisco), where such resident with his family, if any, customarily spends the night," was to prevent persons actually employed on the job from living long distances from their employment, which would require commuting and increase the possibility of their frequently reporting late for work.

THIRD. THE STATE COURT DELIBERATELY SUBSTITUTED AN ASSUMPTION CONTRARY TO ACTUAL FACT FOR A FACT, AND HAS THUS DEPRIVED PETITIONER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND HAS DENIED HIM THE EQUAL PROTECTION OF THE LAW, IN VIOLATION OF ARTICLE XIV, SECTION 1, OF THE CONSTITUTION OF THE UNITED STATES.

When the constitution says "No State shall . . ." it, of course, includes all of the instrumentalities

through which the state government operates, the legislative, the executive and the judicial, because it is through these instrumentalities that the state acts.

The *actual fact* in question is the existence of a meticulously spelled out definition by the framers of the Charter of the City and County of San Francisco as to just what they mean by a resident. (Section 7, Appendix A attached, *infra*, page iii.) They say that:

> "A 'resident within the intent and purpose of this section, means one who actually lives within the city and county and maintains an abode therein, where such resident with his family, if any, customarily spends the night . . ."

The exposition by the District Court of Appeal on the matter of residence is not intelligible, when viewed in the light of this charter section, which has been quoted in full in the appendix as it has been considered by that Court in its entirety. This exposition (Opinion, Appendix B attached, *infra*, page x et seq.) laboriously seeks to build up the assumption and then deliberately proceeds thereon, that the charter section also contemplates some sort of legal residence. The Court does this even though the first sentence of Section 7 clearly considers a "resident" and an "elector" as distinct. The section provides that an elective official to be eligible for election must be both a resident and an elector. Employees to be eligible for appointment are required to be residents as that term has been defined by the section, but there is no requirement that they also be electors. (Petitioner was an

employee.) The section then goes on to give its definition of a resident as quoted above. How then, is the Court justified in saying:

> "However, taking section 7 as a whole it is obvious that the definition of 'resident' there given was not intended to be limited by that definition. In addition to merely maintaining his place of abode in San Francisco the employee is required to maintain his residence there, . . ." (Opinion, Appendix B attached, *infra,* page xiii.)

This is an *assumption contrary to fact.* The fact that the framers of the charter section very carefully spelled out what they meant by a 'resident.' Why then take the section as a whole? It does not ask to be taken as a whole. It cries out and pleads to be taken as it is. It says "A 'resident' within the intent and purpose of this section, means . . ."

The assumption had to be made to justify petitioner's dismissal. The opinion contains many statements in direct contradiction to each other, it is riddled with inconsistencies, and it persistently injects irrevelant material. It utterly fails to justify a requirement for what it terms legal residence, but nevertheless goes blandly on to base its holding on that requirement. Furthermore, it indicates a complete lack of understanding of the holding in *Gallagher v. United States,* 66 F. Supp. 743, 744.

Petitioner has consistently maintained from the outset that in view of the provisions of Public Law No. 346 and the pertinent local ordinances, particularly in view of that part of Charter Section 7 which says

"during incumbency of office or employment, . . ." its residence requirement did not pertain to him. This is so because it is at once apparent that by "during . . . employment" is meant during actual employment and does not include periods of extended leave. However, the irrevelant issue of residence was injected from the start, has been persisted in, and, of necessity, must be met and explained.

Even if it is admitted that residence is a relevant issue, which petitioner certainly does not admit, then what kind of residence is required? The obvious answer to this query is "That residence which was meticulously spelled out by the framers of the charter." However, this will not do for the purpose of justifying petitioners dismissal, because it would be absurd to argue that if he had entered Harvard University he must nevertheless spend the night in San Francisco. Yet this is exactly what the state Court said must be done:

> "We can see no construction of the section other than the one given it by the director, the civil service commission, and the superior Court, namely, that even though on leave, the residence requirement must be complied with." (Opinion, Appendix B attached, *infra*, page xii.)

The lower Court clearly sought to bolster up its argument by the injection of a totally unwarranted legal residence requirement, a requirement which can nowhere be found in or assumed from the charter section, and by sustaining petitioners dismissal has thus deprived him of his property without due process

of law and denied to him the equal protection of these laws.

FOURTH. THE DECISION OF THE STATE COURT BELOW CIRCUMVENTS PUBLIC LAW NO. 346, AND OTHER LAWS OF LIKE CHARACTER, IN SUCH A MANNER AS TO DENY OR DISPARAGE RIGHTS IN VIOLATION OF ARTICLE IX OF THE CONSTITUTION OF THE UNITED STATES.

Federal Public Law No. 346, together with civil service Rule 31.3, which referred to it and substantially incorporated its provisions, gave petitioner the status which he was enjoying "on leave without pay" at the time decision was made to dismiss him from the city and county service. The law was made part of the original pleadings in the Superior Court, (Allegations No. VI-VIII.) It was presented in argument before both that Court, and the District Court of Appeal, and is indirectly adverted to in the opinion of the latter Court.

This law specifically states that the institution at which courses are pursued need not be in the State of Residence of the beneficiary thereunder, nor even in the United States. Its clear intent is to allow a wide latitude in that regard, and the wording of Civil Service Rule 31.3 is a recognition thereof.

The decision of the state Court below has circumvented the effect of Public Law No. 346 by restricting its use to petitioner only if he maintains "an abode therein (in San Francisco), where such resident with his family, if any, customarily spends the night." Such a restriction will now apply to all other persons

on extended military or educational leave from city, county or state positions under the provisions of Public Law No. 346, or any other law of like character, including recent similar legislation respecting Korean veterans.

The requirement, therefore, that petitioner maintain an *abode* in the City and County of San Francisco during all of the period of his educational leave is an absurdity. The use of this purported requirement in defense of dismissal from the service is a rank injustice to petitioner, and to allow such a contorted interpretation to stand cannot but injuriously affect the leave status of all city, county and state employees in California.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted, and petitioner prays for his costs and disbursements.

Dated, Walnut Creek, California,
October 22, 1957.

Respectfully submitted,
HAROLD P. BALLF,
Attorney at Law in Pro Per.

(Appendices A, B and C Follow.)

Appendix A

(Statutory Provisions Cited and Quoted)

Public Law 346, 58 Stat. 284, 78th Congress Servicemen's readjustment Act of 1944—Excerpts

Part VIII

"1. Any person who served in the active military or naval service on or after September 16, 1940, and prior to the termination of the present war, and who shall have been discharged or released therefrom under conditions other than dishonorable . . . shall be eligible for and entitled to receive education or training under this part . . .

"2. Education under Act — Provided, That his work continues to be satisfactory throughout the period, according to the regularly prescribed standards and practices of the institution; . . .

"3. Such person shall be eligible for an entitled to such course of education or training as he may elect, and at any approved educational or training institution at which he chooses to enroll, whether or not located in the state in which he resides, which will accept or retain him as a student or trainee in any field or branch of knowledge which such institution finds him qualified to undertake or pursue: . . . And provided further, That any such course of education or training may be discontinued at any time, if it is found by the Administrator that, according to the regularly prescribed standards and practices of the

institution, the conduct or progress of such person is unsatisfactory." (58 Stat. 287, 288.)

Constitution of the United States, Articles In Addition To, and Amendment of, The Constitution of the United States of America.

Article V.

"No person shall be held to answer . . ., nor be deprived of life, liberty, or property, without the due process of law; . . ."

Article IX.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Article XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

City and County of San Francisco Charter Provisions.

"Section 7. No person shall be a candidate for any elective office, nor shall be appointed as a member of any board of commission or as an officer of the city and county unless he shall have been a resident of the city and county for a period of at least five years and an elector thereof for at least one year immediately prior to the time of his taking office, unless otherwise specifically provided in this charter. All employees of the city and county shall be citizens and shall have been residents thereof, for at least one year prior to the appointment, unless otherwise specifically provided in this charter, and members of the fire and police departments shall be citizens and shall have been residents of the city and county for at least five years next preceding appointment, and every elected officer, member of any board or commission and employee, including members of the fire and police departments, shall continue to be a resident of the city and county during incumbency of office or employment, and upon ceasing to be such resident, shall be removed from such office or employment; provided that where competent citizens who are residents of the city and county cannot be secured to fill positions outside of the city and county, then non-resident citizens may be appointed to fill such positions; and provided, also, that positions requiring expert or technical training may, on the recommendation of the department head and the mayor, and with the approval of the civil service commission and the board of supervisors, be exempted from the requirements of this

section. A 'resident' within the intent and purpose of this section, means one who actually lives within the city and county and maintains an abode therein, where such resident with his family, if any, customarily spends the night, provided, however, that residence outside the confines of the city and county for a period of not to exceed three months in any calendar year, or absence of a resident from the city and county upon any bona fide journey, whether for business or pleasure and for whatever length of time, or absence of a resident while in the performance of any duties of an elected or appointed official or employee of the State of California or the government of the United States, shall not be within the contemplation of this section; provided, however, that any officer or employee of the city and county may live outside the City and County of San Francisco upon the authorization of the director of health, filed in the office of the civil service commission, and granted on account of the ill health of said officer or employee or the ill health of a member of the immediate family of said officer or employee. (Amended, 1933)"

"Section 153. Leaves of absence to officers and employees of the city and county shall be governed by rules established by the civil service commission, . . ."

"Section 154. . . . Removal or discharge may be made for any of the following causes: incompetence, habitual intemperance, immoral conduct, insubordination, discourteous treatment of the public, dishonesty, inattention to duties, or engaging in prohibited political activities. . . ."

Rule of the Civil Service Commission of the City and County of San Francisco governing educational leave.

"Rule 31.3. Leaves Without Pay Pursuant to Government Training & Educational Programs for Veterans. Any veteran of the armed forces discharged or released under honorable conditions who holds permanent civil service status as an officer or employee of the city and county, and who is entitled to benefits under any vocational or other training or educational program pursuant to laws of the United States or the State of California, will be granted leave of absence while attending and pursuing courses of studies authorized and established thereunder, providing the interests of the city and county, or a department thereof, are not seriously impaired by the granting of such leave. Requests for leaves of absence under the provisions of this rule shall first be filed by the officer or employee with the appointing officer under whose jurisdiction he serves. The appointing officer shall either recommend approval or disapproval of the request and his reasons therefor, and shall, without delay, forward the request with his recommendation to the Civil Service Commission for action. If the appointing officer recommends denial of the request he shall indicate thereon in what manner and to what extent the interests of the city and county, or his department, will suffer by reason of the granting of the leave. The commission shall investigate the circumstances in connection therewith and shall thereupon approve or disapprove the request of the officer

or employee in accordance with its judgment. Proof of attendance at such courses of study satisfactory to the commission shall be filed by the officer or employee on completion of the course of study, and periodically at the end of such school terms. Such leaves shall stand abridged not later than thirty days after the completion of the course of study or if the employee discontinues the course of study.

Rules On Appeal from the Supreme Court and District Courts of Appeal of the State of California.

"Rule 28. Hearing in Supreme Court

(a) . . .

(b) . . . When such copies are delivered to the clerk of the District Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper District Court of Appeal. . . ."

Appendix B

COPIES OF OPINIONS AND JUDGMENTS BELOW.

(Vol. 151 A.C.A. 875.)

In the District Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 17,310

HAROLD P. BALLF,
Petitioner,

vs.

THE PUBLIC WELFARE DEPARTMENT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, and RONALD H. BORN, director thereof, and THE CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, and individual members thereof, FRANCIS P. WALSH, WILLIAM A. LAHANIER, and CHARLES T. MCDONOUGH, and THE RETIREMENT BOARD OF THE CITY AND COUNTY OF SAN FRANCISCO EMPLOYEES' RETIREMENT SYSTEM, and IRA G. THOMPSON, secretary thereof,
Respondents.

OPINION

Petitioner appeals from the portion of the judgment of the superior court denying a writ of mandate to

compel respondents to restore him to his prior civil service employment in the City and County of San Francisco.[1]

QUESTION PRESENTED

Did petitioner cease to be a resident of San Francisco and thereby provide cause for his dismissal under the charter?

FACTS

Petitioner was employed in 1933 as a civil service employee of San Francisco, working until 1937 as an employee of the public utilities commission. From 1937 to 1940 he worked for the public welfare department, classified as General Clerk-Typist B-512. It is his later dismissal from this position which is the basis of this appeal. From 1940 to 1949 he was on military leave, being on active duty with the Army. While still on such leave he applied for and received educational leave under rule 31.3 of the civil service commission, for the period August 1, 1949, to July 31, 1953. November 9, 1949, the civil service commission filled his vacancy by an appointment "vice Mr. Ballf." While on this leave petitioner attended the University of California at Berkeley where he received a general secondary credential for teaching and a M.A. in education. July 9, 1953, he requested an extension of his educational leave for 36 months commencing August 1,

[1]The judgment also decreed that he is entitled to exercise his option as a member of the retirement system as to his rights in accord with the provisions of section 165.2 of the charter. Obviously he does not appeal from that portion of the judgment.

1953, to pursue his studies to obtain a Ph.D. The civil service commission did not act on the request. Instead, it directed the director of public welfare to initiate dismissal proceedings under section 7 of the charter (residence requirement) if petitioner did not resign.

Pursuant to section 154 of the charter a public hearing was held before the appointing officer of the department in which petitioner was employed (the director of public welfare). The charges against petitioner were:

1. Insubordinate inattention to duties because of failure to return from educational leave.

2. Loss of residence as required under section 7 of the charter of the City and County of San Francisco.

3. Violation of the terms of the educational leave.

(a) Failure to maintain a full curriculum in the University of California.

(b) Failure to present proof of attendance at the end of the various school terms in accordance with the provisions of rule 31.3, Civil Service Commission.

(c) Mr. Ballf had not used his educational leave entirely for educational purposes, but during the summer vacation had been on military duty and other things which are not for the purpose for which the educational leave was granted.

The director found all charges against petitioner true and dismissed him from service. On appeal, the Civil Service Commission sustained the director. Petitioner applied to the Superior Court for a writ of certiorari and an administrative writ of mandamus.

After a hearing and a review of the transcript of the administrative proceedings the Court denied the writs but held that petitioner had sufficient service to exercise his option to remain a member of the city and county's retirement system.

RESIDENCE

The most serious question concerns the charge of loss of residence in San Francisco. Section 7 of the charter provides: ". . . All employees . . . shall continue to be resident of the city and county during incumbency of office or employment, and upon ceasing to be such resident, shall be removed from office or employment; . . . A 'resident' within the intent and purpose of this section, means one who actually lives within the city and county and maintains an abode therein, where such resident with his family, if any, customarily spends the night, provided, however, that residence outside the confines of the city and county for a period not to exceed three months in any calendar year, or absence of a resident from the city and county upon any bona fide journey, whether for business or pleasure and for whatever length of time, or absence of a resident while in the performance of any duties as an elected or appointed official or employee of the State of California or the government of the United States, shall not be within the contemplation of this section. . . ."

While attending the university petitioner moved from San Francisco to Walnut Creek, Contra Costa County. There he became part owner of the property

on which he lived. In April, 1950, he requested cancellation of his San Francisco voting registration and registered to vote in Contra Costa County. Petitioner testified that although he still considered San Francisco his residence he had no domicile nor mailing address in San Francisco. The director found that petitioner was an "incumbent during incumbency of employment." Obviously "incumbency of office" pertains to an office or benefice. See *Leymel v. Johnson* (1930), 105 Cal.App. 694 [288 P. 858], and *Curtin v. State,* 61 Cal.App. 377 [214 P. 1030]. The latter case quotes from a statement by Chief Justice Marshall: "Although an office is an employment, it does not follow that every employment is an office." (P. 386.) Petitioner's position as general clerk-typist was not an "office" but an "employment." Actually it makes no difference whether petitioner was in the incumbency of employment or as a more logical construction requires, was in "employment." Either way he was required to remain a resident of San Francisco. The fact that a person is on leave from his "employment" makes him no less an employee. As a matter of fact, petitioner claims to be an employee. He has to be in order to assert the rights claimed by him. Petitioner's right to educational leave is dependent upon his being an employee. Rule 31.3 of the Civil Service Commission provides that educational leave may be granted to a veteran "who holds permanent civil service status as an officer or *employee* . . ." (Emphasis added.) That petitioner was holding his "employment" is well illustrated by the fact that any time he desired to termi-

nate his leave he could have returned to his position as a matter of right and the person holding it "vice Mr. Ballf" would have had to give it up. For all purposes he was an employee of the department except that his leave temporarily excused him from performing his actual duties. (See *Thompson v. Young* (D.C. 1945), 63 F.Supp. 890, 891.) We can see no construction of the section other than the one given it by the director, the Civil Service Commission, and the superior court, namely, that even though on leave, the residential requirement must be complied with.

Truly, as petitioner says, residence is primarily a matter of intent. He claims he never intended to cease to be a resident of San Francisco. In determining residence, however, the Courts look to a person's actions as well as to his statement of intent. One of the important acts to be considered is where he has registered to vote. While not conclusive of the question, his registration is of considerable importance. (See *Gallagher v. United States*, 66 F.Supp. 743, 744, holding that "voting" is important evidence on the issue of "domicile" but not necessarily decisive.) In this type of proceeding we do not pass upon the credibility of a witness nor upon the weight of the evidence. Our function is to determine whether there was substantial evidence to support the finding of the trial Court.[2] Petitioner's change of registration and his lack of a domi-

[2]For the scope of review of both the superior court and this court in this type of case, see *La Prade v. Department of Water & Power*, 27 Cal.2d 47 [162 P.2d 13]; *Corcoran v. San Francisco etc. Retirement System*, 114 Cal.App.2d 738 [251 P.2d 59]; 3 Witkin, California Procedure, 2489-2490.

cile or mailing address in San Francisco constitute substantial support for the Court's finding and that of the director that petitioner is not and did not continue to be a resident of San Francisco within the meaning of section 7.

For the same reason there is substantial support for the implied finding that petitioner's change of residence does not come within the exceptions provided by the section. Certainly, absence from the city for the term of his education leave is excused, but nevertheless the employee must maintain himself as a "resident" there.[3] Petitioner contends that the definition of "resident" as given in section 7 excludes any requirement that he maintain a legal residence there as distinguished from the requirement that he maintain his place of abode there, and that as a result of his leave excusing him from the latter, he cannot be dismissed from his employment. However, taking section 7 as a whole it is obvious that the definition of "resident" there given was not intended to be limited by that definition. In addition to merely maintaining his place of abode in San Francisco the employee is required to maintain his residence there, although there is no requirement that in addition to being a resident he must also be a voter. The reference to abode amplifies the requirement of residence. It undoubtedly was

[3]Although there is no direct provision on the subject in the charter, excuse from maintaining his place of abode there necessarily follows from the authorization to grant an employee educational leave. This is well shown by the fact that were the holder of the leave to attend an educational institution in the east or south it would be physically impossible for him to return to San Francisco each night.

inserted to prevent the following situation which could well occur without it. An employee maintaining his legal residence in the city and perhaps, even being registered to vote there, nevertheless could with his family live the greater portion of the year in some nearby locality. Section 7, therefore, requires that in addition to being a resident of the city he must with his family live there at all times other than as excepted by the section.[4] We see no escape from holding that section 7 while impliedly permitting a change of place of abode by an employee on educational leave does not permit a change of residence. We do not hold that buying a home and registering to vote in another county as a matter of law compels the conclusion that the employee has changed his residence where he claims that he had no intention of so doing. However, they are strong circumstances which the trier of fact of residence (here, the director in the first instance, and the Superior Court on review) may consider (and here did) as overcoming the employee's claim that he did not intend to change his residence.[5]

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[4]Such a temporary abode elsewhere for the limited time provided, or remaining away while on a journey, or working for the state or government. Although not expressed, educational leave also provides an exception.

[5]In his affidavit of registration the affiant swears that he has been a *resident* of the county where he is registering for 90 days next preceding the next election and will be an "elector" of that county at said election. (Elec. Code, §230.) Section 20 provides that an "elector" means any person who qualifies under section 1, article II, Constitution. That section requires that the person be a "resident" of the county for 90 days next preceding the next election. Also section 230, Election Code, requires the person to state the county in which he is presently registered and to "request that said registration be canceled."

(See *Warren v. Warren,* 127 Cal.App. 231, 240 [15 P.2d 556], for right of the trier of fact to determine that a person's acts may control over his statement of intention.)

Petitioner contends that the words in section 7 "removal from such office or employment" for ceasing to be a "resident" does not mean "dismissal," but only a temporary removal until such time as the employee might again become a resident. There is no merit in such contention. Such an interpretation would leave the civil service system in great confusion. No permanent appointment to fill the position of the "removed" employee could be made.

As there is substantial evidence to support the finding of the director and of the Superior Court that petitioner was no longer a resident of San Francisco and that his discharge from employment on the ground was proper, we see no reason for considering the other grounds upon which his discharge was based.

The judgment is affirmed.

Bray, J.

Peters, P. J., and Wood (Fred B.), J., concurred.

Filed June 19, 1957,
Lawrence R. Elkington, Clerk.

Minute order of District Court of Appeal denying rehearing.

"17310—*Ballf v. Public Welfare Department of the City and County of San Francisco.* (151 A.C.A. 875.)

By the Court: The petition for a rehearing filed in the above entitled cause is hereby denied. Peters, P. J. Dated July 19, 1957." (152 A.C.A. 522 "Minutes".)

Minute order of the Supreme Court of the State of California denying a hearing.

"—(1st Civ. 17310, Div. 1.)—*Ballf v. The Public Welfare Dept. of the City and County of San Francisco, etc., et al.* (151 A.C.A. 875.) Appellant's petition for hearing denied. Carter, J., is of the opinion that the petition should be granted."

Judgment of the Superior Court of the State of California in and for the City and County of San Francisco, which was appealed to the District Court of Appeal, R 70.

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the peremptory writ of mandate sought by the petitioner against the respondents Public Welfare Department of the City and County of San Francisco, Ronald H. Born, Director thereof, the Civil Service Commission of the City and County of San Francisco, and Francis P. Walsh, Wm. A. Lahanier and Charles McDonough, as members thereof, be and the same is hereby denied." (Part 2 was not appealed.)

Appendix C

CONFLICTING OPINION.

The judgment and decrees of the Courts below were not in accord with the intent and purpose of federal Public Law 346, and the holding in *Gallagher v. United States,* 66 F.Supp. 743, 744 was entirely misconstrued.

Judgment of Superior Court of City and County of San Francisco was dated and entered on January 12, 1956.

The opinion of the District Court of Appeal was filed June 19, 1957. Petition for rehearing was denied July 19, 1957.

Minute order of the Supreme Court of the State of California denying a hearing was made and filed August 13, 1957.